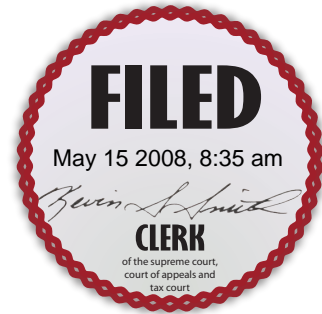


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

GARY B. PLUNKITT
Brownsburg, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

GARY B. PLUNKITT,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 32A01-0710-CV-490
)	
US BANK NATIONAL ASSOCIATION, As)	
Trustee,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE HENDRICKS CIRCUIT COURT
The Honorable Jeffrey V. Boles, Judge
Cause No. 32C01-0705-MF-92

May 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPBACK, Sr. Judge

Gary Plunkitt appeals the trial court's order granting a notice of dismissal filed by US Bank National Association ("US Bank"). Plunkitt raises three issues, which we revise and restate as whether the trial court abused its discretion by granting US Bank's notice of dismissal without prejudice.¹ We reverse and remand.

The relevant facts follow. In May 2007, US Bank filed a complaint against Plunkitt, which alleged that Plunkitt had defaulted under the terms of a Note and Mortgage. On July 11, 2007, Plunkitt filed a pro se Responsive Pleading denying the allegations in U.S. Bank's complaint. On July 23, 2007, U.S. Bank filed a motion for summary judgment. On September 4, 2007, Plunkitt filed a Withdrawal of Defendant's Offer of Deed in Lieu, a Partial Response to US Bank's Motion for Summary Judgment, a motion for summary judgment, and a motion to strike portions of affidavits in support of US Bank's motion for summary judgment.

On September 6, 2007, the trial court held a hearing. At the hearing, the trial court referenced some "late filed pleadings" by Plunkitt, and US Bank's attorney stated that he had not seen the pleadings. Transcript at 6. Plunkitt stated that he had served US Bank "by Fed Ex on the 4th." Id. at 7. US Bank's attorney asked to see the pleadings and reschedule the hearing for argument. The trial court rescheduled the hearing for September 25, 2007.

¹ Plunkitt also raises the issues of whether the trial court erred by denying his motion to strike and his motion for summary judgment. The trial court granted US Bank's notice of dismissal and never reached the issues of Plunkitt's motion to strike or motion for summary judgment. Thus, we do not

On September 21, 2007, US Bank filed a notice of dismissal, which stated, “[US Bank], pursuant to Civil Rule 41 (A) (1) of the Indiana Rules of Trial Procedure hereby dismisses its Complaint filed in the above cause of action, without prejudice, costs to [US Bank].” Appellant’s Appendix at 83. The trial court entered an order of dismissal, which stated:

On application of [US Bank] pursuant to Civil Rule 41 (A) (1) of the Indiana Rules of Trial Procedure, and for good cause shown, the Notice of Dismissal entered herein is hereby granted, and [US Bank]’s Complaint is dismissed without prejudice and costs to [US Bank].

Id. at 85.

The sole issue is whether the trial court abused its discretion by granting US Bank’s voluntary notice of dismissal without prejudice. We review voluntary motions to dismiss for an abuse of discretion. See Tapia v. State, 753 N.E.2d 581, 584 (Ind. 2001) (holding that “abuse of discretion is the well-established standard of review for voluntary motions to dismiss in the somewhat rare cases when such motions are subject to appeal”) (citing Mattingly v. Whelden, 435 N.E.2d 61, 64 (Ind. Ct. App. 1982)). “An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court or if the trial court has misinterpreted the law.” Office Environments, Inc. v. Lake States Ins. Co., 833 N.E.2d 489, 493 (Ind. Ct. App. 2005).

address these issues.

Initially, we note that US Bank did not file an appellee's brief. When an appellee fails to submit a brief, we do not undertake the burden of developing appellee's arguments, and we apply a less stringent standard of review, that is, we may reverse if the appellant establishes prima facie error. Zoller v. Zoller, 858 N.E.2d 124, 126 (Ind. Ct. App. 2006). This rule was established so that we might be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. Wright v. Wright, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002).

Plunkitt argues, in part, that the trial court should not have granted US Bank's notice of voluntary dismissal without prejudice pursuant to Ind. Trial Rule 41(A)(1) because Plunkitt had already filed a responsive pleading and a motion for summary judgment. US Bank filed a notice of dismissal under Ind. Trial Rule 41(A)(1), and the trial court entered an order of dismissal pursuant to Ind. Trial Rule 41(A)(1), which governs the voluntary dismissal of actions by a plaintiff and provides:

- (A) Voluntary dismissal: Effect thereof.
 - (1) By plaintiff--By stipulation. Subject to contrary provisions of these rules or of any statute, an action may be dismissed by the plaintiff without order of court:
 - (a) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs; or
 - (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim. The provisions of this subdivision shall not apply if the plaintiff in such action could not effectuate service of process, or otherwise procure adjudication on the merits.

Here, Plunkitt filed his Responsive Pleading, which contained a certificate of service, on July 11, 2007. Plunkitt also filed a motion for summary judgment on September 4, 2007, before US Bank filed its notice of dismissal on September 21, 2007. Because US Bank did not file a notice of dismissal before service by Plunkitt of an answer or motion for summary judgment, US Bank was not able to dismiss this action under Ind. Trial Rule 41(A)(1).² We conclude that the trial court abused its discretion by dismissing US Bank's action. See Jacobs v. City of Columbus By and Through Police Dep't, 454 N.E.2d 1253, 1263 (Ind. Ct. App. 1983) (holding that the plaintiff was not entitled to dismiss as of right according to the clear language of Ind. Trial Rule 41(A)(1) because the defendant had filed an answer and motion for summary judgment), reh'g denied; Mattingly v. Whelden, 435 N.E.2d 61, 64 (Ind. Ct. App. 1982) (holding that a voluntary

² We acknowledge that Ind. Trial Rule 41(A)(2) provides for voluntary dismissal by order of the trial court and "permits a plaintiff to voluntarily dismiss an action without prejudice after a responsive pleading or motion for summary judgment has been filed, but only pursuant to court order." Principal Life Ins. Co. v. Needler, 816 N.E.2d 499, 502 (Ind. Ct. App. 2004). However, US Bank's notice of dismissal and the trial court's order of dismissal did not address Ind. Trial Rule 41(A)(2). As previously mentioned, US Bank's notice of dismissal stated that "[US Bank], pursuant to Civil Rule 41 (A) (1) of the Indiana Rules of Trial Procedure hereby dismisses its Complaint," and the trial court's order of dismissal stated "On application of [US Bank] pursuant to Civil Rule 41 (A) (1) of the Indiana Rules of Trial Procedure, and for good cause shown, the Notice of Dismissal entered herein is hereby granted, and [US Bank]'s Complaint is dismissed without prejudice and costs to [US Bank]." Appellant's Appendix at 83, 85. Thus, we do not reach the issue of Ind. Trial Rule 41(A)(2).

dismissal under Ind. Trial Rule 41(A)(1) was not timely because it followed the service of motions for summary judgment by the adverse parties).

For the foregoing reasons, we reverse the trial court's order of dismissal and remand for proceedings consistent with this opinion.

Reversed and remanded.

NAJAM, J. and DARDEN, J. concur